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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AND NATIONAL ALLIANCE ON MENTAL ILLNESS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association is a voluntary, nonprofit, scientific and professional organization with more than 155,000 members and affiliates, and is the major association of psychologists in the nation.

The American Psychiatric Association, with more than 36,000 members, is the nation's leading organization of physicians who specialize in psychiatry.

The National Alliance on Mental Illness was founded in 1979 and is the nation's largest grassroots organization dedicated to improving the quality of life of persons living with serious mental illness and their families.

Members of *amici* are regularly called before courts to participate in competency hearings. *Amici* therefore have both pertinent expertise and a strong interest in the establishment of legal competency standards consistent with the best scientific knowledge about individuals suffering from mental illness. The American Psychological Association and the American Psychiatric Association have filed briefs for this Court's consideration in similar cases, including *Roper* v. *Simmons*, 543 U.S. 551 (2005); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (via briefs submitted in *McCarver* v. *North Carolina*, *cert. dismissed* 533 U.S. 975 (2001)); and *Ford* v. *Wainwright*, 477 U.S. 399 (1986). The National Alliance on Mental Illness submitted a brief in support of petitioner's writ of certiorari in the instant case.[2]

In 2003, the American Bar Association established a Task Force on Mental Disability and the Death Penalty, which included mental health professionals who are mem-

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[1] Both parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] The National Alliance on Mental Illness submitted its brief in support of the writ of certiorari under its previous name, the National Alliance for the Mentally Ill.

bers and representatives of *amici*. The Task Force was convened in light of this Court's decision in *Atkins* to address unresolved issues concerning application of the death penalty to persons suffering from impaired mental conditions. In 2005, the Task Force presented a series of recommendations. Of pertinence here, in light of *Atkins* and this Court's subsequent decision in *Simmons*, the Task Force identified several situations in which the death penalty should not be applied to individuals with mental illness. One category encompasses individuals who, though having been determined competent to stand trial and sentenced to death, suffer from a severe mental disorder or disability that renders them incompetent to understand the nature and purpose of the death penalty. This category would include, for example, individuals whose mental illness worsens in material respects after imposition of valid sentences.[3] Based on the Task Force Report *amici* and the American Bar Association recommended, in substantially similar form, that the death penalty should not be applied to such persons.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit, in this case and in *Barnard* v. *Collins*, 13 F.3d 871 (5th Cir. 1994), has adopted a very narrow construction of this Court's decision in *Ford*, a construction that permits the execution of individuals whose severe mental illness precludes them from understanding that the State is putting them to death as retribution for their crimes. The

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[3] In addition to the recommendation discussed in text, the Task Force presented, and *amici* and the ABA adopted, recommendations relating to persons with mental retardation and equivalent impairments of intellectual and adaptive functioning, persons who were mentally ill at the time of the offense, and persons not competent to seek or assist counsel in post-conviction proceedings. *See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

[4] *Amici* gratefully acknowledge the assistance of Richard J. Bonnie, J.D., Joel A. Dvoskin, Ph.D., Kirk S. Heilbrun, Ph.D., and Diane T. Marsh, Ph.D., in the preparation of this brief.

Fifth Circuit recognized that Scott Panetti suffers from schizoaffective disorder, a severe form of psychosis, and that as a direct result he "suffer[s] from paranoid delusions that his [sentence of] execution was the result of a conspiracy against him and not his crimes." *Panetti* v. *Dretke*, 448 F.3d 815, 819 (5th Cir. 2006). The court of appeals nevertheless deemed Panetti competent to be executed under *Ford*.

Amici respectfully submit that the Fifth Circuit's approach is inconsistent with the reasoning of the controlling opinions in *Ford*. Scientific knowledge about schizophrenia and schizoaffective disorder supports the conclusion that persons in Panetti's condition cannot rationally understand the reasons for their execution. Convinced of the reality of their delusions, they simply cannot grasp the essential truth: that their impending execution is retribution for their crimes. Where the prisoner cannot appreciate the reason, his execution cannot further the retributive purpose of the death penalty any more than if the prisoner, as in *Ford*, suffers delusions that he can never be executed at all. As explained further in this brief, for these reasons *amici* American Psychological Association, American Psychiatric Association and the National Alliance on Mental Illness each has resolved that a prisoner is not competent to be executed if he "has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case." *See, e.g.*, American Psychological Association Council of Representatives, APA Policy Manual: N. Public Interest (2001) (incorporating policy adopted by the Council of Representatives in February 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8 (last visited Feb. 21, 2007).[5] *Amici*'s ap-

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[5] The term "appreciate" approximates the term "rationally understand." *See* Norman G. Poythress, *et al.*, *Adjudicative Competence: The MacArthur Studies* 112 (2002).; *see also Martin* v. *Dugger*, 686 F. Supp. 1523, 1569-1573 (S.D. Fla. 1988).

proach, which is consistent with *Ford*, requires reversal of the Fifth Circuit here.

In Part I of this brief, *amici* explain that individuals who, like Panetti, suffer from severe psychotic disorders such as schizophrenia or schizoaffective disorder, frequently suffer from bizarre delusions that disrupt their understanding of reality. These delusional beliefs are genuine and often unshakeable, withstanding all attempts to introduce logic or contrary evidence. When they attach to the State's reasons for carrying out the mentally ill prisoner's execution, such delusions can deny the prisoner all rational understanding about "why" he is to be executed. In such a circumstance, proceeding with the execution would not further the purposes of the death penalty. In Part II, *amici* explain that mental health experts can assist the courts in identifying prisoners with mental illness who suffer delusions that preclude them from understanding the actual reasons for their execution. Mental health professionals routinely evaluate patients for the presence of delusional beliefs and generate reliable conclusions as to how those delusions impact the patients' ability to rationally understand information.

ARGUMENT

I. THE FIFTH CIRCUIT'S INTERPRETATION OF *FORD* V. *WAINWRIGHT* FAILS TO PROTECT A CLASS OF SEVERELY MENTALLY ILL PRISONERS, IN CONTRAVENTION OF THE PURPOSES THAT ANIMATED *FORD*

A. In *Panetti* And *Barnard*, The Fifth Circuit Has Interpreted And Applied *Ford* Very Narrowly

In 1986, this Court held that the Eighth Amendment forbids the execution of individuals suffering from mental illness that renders them incompetent. *Ford* v. *Wainwright*, 477 U.S. 399 (1986). The Court relied on common law to support its interpretation of the Eighth Amendment and identified several reasons why the execution of the insane is

unacceptable in a civilized society. *Id.* at 409-410.[6] As one justification, the Court "seriously question[ed] the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id.* at 409. Yet, while suggesting that the Constitution prevents the execution of a prisoner who lacks "comprehension of why he has been singled out" for death, the Court did not provide a substantive test for defining insanity in this context. Justice Powell attempted to do so, in a separate concurring opinion largely devoted to explaining his disagreements with the procedural protections set forth by the four-justice plurality. Justice Powell noted that "today, as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." *Id.* at 421 (Powell, J., concurring). Accordingly, he concluded that "the Eighth Amendment forbids the execution . . . of those who are unaware of the punishment they are about to suffer *and why they are to suffer it.*" *Id.* at 422 (emphasis added). Justice Powell recognized that the Constitution requires, as a minimum before a prisoner may be deemed competent to be executed, that the prisoner be aware of both the fact that he will be put to death and the reason for that: society's retribution for his criminal acts.

Justice Powell's formulation has been cited approvingly by this Court, *see Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989), and has been adopted unanimously by the circuits that have faced this issue, *see Walton* v. *Johnson*, 440 F.3d 160, 170-171 (4th Cir. 2006); *Scott* v. *Mitchell*, 250 F.3d 1011, 1014 (6th Cir. 2001); *Massie* v. *Woodford*, 244 F.3d 1192, 1195 n.1 (9th Cir. 2001); *Rector* v. *Clark*, 923 F.2d 570, 570 (8th Cir. 1991), including the Fifth Circuit, *Lowenfield* v. *Butler*, 843 F.2d 183, 187 (5th Cir. 1988). Yet, perhaps because nei-

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[6] Justice Powell concurred in parts one and two of Justice Marshall's opinion, 477 U.S. at 418, creating a majority for the holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409.

ther the *Ford* majority nor Justice Powell's concurrence articulated the execution competency standard with the same specificity that is characteristic of some of this Court's other competency opinions, *see, e.g.*, *Godinez* v. *Moran*, 509 U.S. 389, 396 (1993) (discussing factual and rational understanding), the Fifth Circuit on two subsequent occasions has applied the test in a way that fails to protect prisoners who possess some ability to understand the fact of their impending execution but clearly exhibit delusional thinking that impairs their comprehension of reality, including their appreciation of the reason for their death sentence.

First, in *Barnard*, the Fifth Circuit allowed the execution of an individual who, it concluded, possessed a factual understanding of the "nature, pendency, and purpose" of his execution—*i.e.*, that he was to be executed because he was convicted of murder—but whose "perception of the reason for his conviction and pending execution [was] at times irrationally distorted by a delusional system in which he attribute[d] anything negative that happen[ed] to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." *Barnard* v. *Collins*, 13 F.3d 871, 876 (5th Cir. 1994). In denying his petition for relief, the Fifth Circuit concluded that "Barnard knew that he was going to be executed and why he was going to be executed—precisely the finding required by the *Ford* standard of competency." *Id.* at 877. The Fifth Circuit ruled against Barnard despite the fact that he adhered to the delusional belief that his conviction and sentence were the result of a vast conspiracy, and in the absence of any finding that Barnard recognized any causal connection between his execution and his *crime*.

In the case at bar, the Fifth Circuit once again has ruled that the Constitution permits the execution of a severely delusional man who has no awareness of the true reason for his execution. In upholding Panetti's death sentence, the court of appeals expressly ruled that the Constitution does not bar the execution of an individual "suffer[ing] from paranoid delusions that his execution was the result of a conspiracy against him *and not his crimes*." *Panetti* v. *Dretke*,

448 F.3d 815, 819 (5th Cir. 2006) (emphasis added). Panetti understands that he has been found guilty of murder and faces execution, but holds the unequivocal and delusional belief that the State is using his crimes as a pretext, and that its real motivation is "to prevent him from preaching the Gospel." *Id.* at 816 (citing *Panetti* v. *Dretke*, 401 F. Supp. 2d 702, 709 (W.D. Tex. 2004)). Relying on *Barnard*, the court of appeals found Panetti's recognition of the State's *articulated* reason for his execution adequate to satisfy the standard set forth in Justice Powell's *Ford* concurrence, despite the court's recognition that Panetti's delusional thinking denies him awareness that the stated rationale is genuine. *Panetti*, 448 F.3d at 819 (noting that "Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only that he must be 'aware' of it").

B. Panetti Is Readily Identifiable As Suffering From Delusions That Commonly Accompany Schizophrenia And Schizoaffective Disorder

Scott Panetti is not an anomaly who by some odd quirk can correctly comprehend the fact of his execution and the State's explanation for it yet who breaks with reality when he ascribes the State's true motivation to a fantastical conspiracy or bizarre purpose. Rather, he is readily recognizable as belonging to the class of mentally ill persons who suffer from severe psychotic disorders that impede their cognitive functioning in some respects while leaving other aspects relatively unimpaired.[7] Such people may possess the ability to comprehend and understand facts about the subject of their delusions, but they are often unable to appreciate the personal significance of those facts or to reason about them in a logical way.

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[7] *Amici* of course have not examined Panetti in person; rather, *amici* rely upon the facts as set forth in the record and on Panetti's prior mental health evaluations.

1. Individuals who suffer from delusions firmly hold false, illogical beliefs that cannot be corrected with reason and that interfere with their ability to interpret ordinary experiences

In the scientific literature, individuals such as Panetti are commonly described as suffering from delusions: false beliefs that cannot be corrected by reasoning and that usually involve a misinterpretation of perceptions or experiences. Such delusions are often characterized by flaws in logical thinking that prevent those who suffer from them from making the right connections between ideas and from testing their beliefs about the world in ways that would enable them to determine the veracity of those beliefs.

Delusional thinking forms part of various psychotic disorders. A delusion has been defined as:

> A false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or subculture (e.g., it is not an article of religious faith). When a false belief involves a value judgment, it is regarded as a delusion only when the judgment is so extreme as to defy credibility.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 821 (4th ed. text rev. 2000) (hereinafter DSM-IV-TR).

Delusional thinking is a hallmark symptom of schizophrenia[8] and of related psychotic disorders, such as schizoaf-

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[8] Schizophrenia is typically defined as encompassing two or more of the following five symptoms: (1) delusions, (2) hallucinations, (3) disorganized speech; (4) grossly disorganized or catatonic behavior; and (5) negative symptoms, *i.e.*, affective flattening (diminished emotional expressiveness), alogia (poverty of speech), or avolition (inability to initiate and persist in goal-oriented activities). DSM-IV-TR 299-301, 312.

fective disorder.[9] It may also occur as a symptom of mood disorders such as depressive disorders or bipolar disorders.[10] It is particularly pronounced in what is known as the Paranoid Type of Schizophrenia. DSM-IV-TR 313-314. The essential feature of this type of schizophrenia is "the presence of prominent delusions or auditory hallucinations in the content of a relative preservation of cognitive functioning and affect." *Id.* at 313. Typically, persons with this condition suffer from delusions that are categorized as *persecutory* and/or *grandiose*. *Id.* A persecutory delusion, generally speaking, is a delusion whose theme involves a conspiracy or other form of malicious obstruction to thwart the individual's goals. *Id.* at 325. A grandiose delusion is one whose central theme involves the patient possessing a great yet unrecognized talent, sometimes accompanied by the belief that the patient has a special relationship with a prominent person or bears a special message from a deity. *Id.* The two types of delusions are often intertwined: persons experiencing persecutory delusions may reason that, as one textbook puts it, "they must be very important if so much effort is spent on their persecution." Robert Cancro & Heinz E. Lehmann, *Schizophrenia: Clinical Features*, in 1 *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 1187 (7th ed. 2000).[11]

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[9] Schizoaffective disorder essentially consists of schizophrenic symptoms coupled with, at some point, either a major depressive episode, a manic episode, or a mixed episode (*i.e.*, an episode in which the individual alternates between major depressive and manic symptoms). DSM-IV-TR 319-323.

[10] *See generally* DSM-IV-TR 345-428; *see also id.* at 327 (discussing Mood Disorders With Psychotic Features).

[11] It is important to distinguish delusional beliefs from beliefs that are merely wrong. An individual who believes that her husband is cheating on her may be mistaken, but her view may not be delusional, depending upon the facts that she adduces to support her belief. But, the individual who, in one reported case, based such a belief solely on the presence of a red car outside of her apartment, is clearly delusional. *See* Adolfo Pazzagli, *Delusion, Narrative, and Affects*, 34 J. of the Am. Acad. of Psychoanalysis & Dynamic Psychiatry 367, 370 (2006).

Psychotic disorders such as schizophrenia distort the mind in certain ways while leaving other functions generally intact. As noted above, an individual with paranoid schizophrenia may possess "a relative preservation of cognitive functioning." DSM-IV-TR 313. Yet such a person, plagued by a delusional psychotic disorder, may have no ability to apply his cognitive functions to test the veracity of the conclusions that he draws; while the *process* of a person's thinking appears normal, the *content* of the thoughts defies accepted reality. For example, a person who is under the delusion that he is the basketball player Michael Jordan may be unable to "test reality" in a way that would disprove his belief. Michael Jordan is tall, athletically gifted, widely recognized, and wealthy. Even after it is pointed out to the delusional person that he possesses none of these characteristics—and even if the person *agrees* that he does not—he may persist in his belief that he is in fact Michael Jordan.

Scientific literature is replete with examples of persons whose reasoning is faulty in this way. In his landmark study *The Three Christs of Ypsilanti*, psychologist Milton Rokeach chronicled the experiences of three patients with schizophrenia in the Ypsilanti State Hospital in Michigan, who each believed that he was Jesus Christ. *See* Milton Rokeach, *The Three Christs of Ypsilanti* 50-74 (1964). Despite their inability to perform the miracles that they claimed to be able to perform, despite their inability to evidence any other Christ-like behavior, and despite their interaction with the others claiming to be Christ, the three individuals persisted in the delusion that they were Jesus Christ.[12] They were only superficially aware that they were in a mental hospital; one believed he owned the surrounding land, another had a variety of explanations for his presence, and the third said he had been sent to straighten out the other two. Shortly

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[12] The third individual at one point switched to a different, equally delusional identity, "Dr. Righteous-Idealed 'R.I.' Dung, Mentalis Doktor," yet at the same time continued to believe he was Jesus Christ. Rokeach, 139-142.

after meeting the first time, the three quickly developed rationalizations for why there were others claiming to be Christ. One, in fact, confirmed his belief that he was the true Christ by pointing out that the other two could not possibly be the true Christ because they resided in a mental hospital.

Such persons may understand much of the world around them and have real intelligence. Yet their delusional thought process may consistently lead them to wildly incorrect results. As one psychiatry textbook explains:

> Disturbances of thinking and conceptualization are one of the most characteristic features of schizophrenia. The feature common to all manifestations of schizophreni[c] thought disorder is that patients think and reason . . . according to their own intricate private rules of logic. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But their thought processes are strange and do not lead to conclusions based on reality or universal logic.

Cancro & Lehmann, *supra*, at 1189. A classic example of this is the case of a woman who believed she was the Virgin Mary. This woman reasoned the following: "The Virgin Mary was a virgin. I'm a virgin. Therefore, I am the Virgin Mary." Silvano Arieti, *Interpretation of Schizophrenia* 195 (1955). By taking two facts and applying a process that appeared to her to be logical, she arrived at a conclusion that—to everyone but her—was not. The internal logic of such delusions is akin to the logic that nondelusional persons experience while dreaming—indeed, individuals with schizophrenia have been described as "dreaming with their eyes open." Cancro & Lehmann, *supra*, at 1190. Thus, a person suffering from schizophrenia or schizoaffective disorder may know that he has committed a crime; that the death penalty is imposed on persons who commit such crimes; and that the State has asserted he will be put to death because he committed that crime; and yet be absolutely and unwaveringly

certain that his execution is not in fact a response to his crime but is instead an effort to prevent him from preaching the Gospel.

2. Panetti suffers from grandiose, persecutory delusions that disrupt his understanding of the purpose of his execution

Based upon the record and findings in this case, Panetti clearly falls into this framework. He is not incoherent: the district court found that "at least some of the time, Panetti is capable of communicating, and apparently understanding, in a coherent fashion." *Panetti*, 401 F. Supp. 2d at 708. As one of the State's experts concluded, Panetti possessed a "capacity to understand the Bible, to understand history, movies." *Id.* Indeed, he represented himself at trial, cross-examined witnesses, and applied for subpoenas.

Yet, in the decade preceding his crime, Panetti was hospitalized with diagnoses that included schizophrenia, schizoaffective disorder, and bipolar disorder—all serious mental disorders that, in his case, were accompanied by psychotic symptoms such as auditory hallucinations and delusions of persecution and grandiosity. Pet. 3. While defending himself at trial, he exhibited a wide array of delusional behaviors. His cross-examination tended to be rambling and illogical, and he attempted to subpoena John F. Kennedy, Pope John Paul II, and Jesus Christ. Although Panetti knows that the State claims it intends to execute him for the murders that he committed, he believes—in the words of one of the experts who examined him—that "God had nullified it, God had forgiven him, God had wiped the slate clean." *Panetti*, 401 F. Supp. 2d at 707. And the district court credited testimony from one of the State's experts who concluded that:

> Panetti does not even understand that the State of Texas is a lawfully constituted authority, but rather, he believes the State is in league with the forces of evil that have conspired against him. [That expert's] testimony is consistent with that of

> Dr. Conroy, Dr. Rosin, and Dr. Silverman, each of whom testified Panetti believes the real reason he is to be executed is for preaching the Gospel.

Id. at 712; *see also id.* at 707 (Panetti suffers from "grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs"). As reflected in the findings and the testimony below, therefore, Panetti is able to draw some logical connections but suffers from textbook persecutory and grandiose delusions centered around religion that render him deeply disturbed and deny him any genuine understanding of the reason for his execution.

Although the record does not reflect the methods employed by the doctors who examined Panetti, it is likely that his delusional belief withstood all attempts to "test reality" by confronting him with contrary evidence. A person who is captive to such a delusion would likely be unconvinced by evidence that, for example (1) the State does not, in fact, seek to execute people for preaching the Gospel, and (2) the State has certainly not sought to execute others whose preaching is heard by many more than Panetti's.[13]

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[13] The record in *Barnard* is much more sparse than in *Panetti*; accordingly, it is difficult to assess the true nature of Barnard's delusions. Because the state court found that Barnard tended to blame his conviction on "a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia," 13 F.3d at 876, it is likely that his beliefs would have withstood efforts to test reality by presenting him with evidence that (1) those five groups do not, in fact, work in concert, (2) there is no reason why those groups would have any motive to do him harm, and, (3) most fundamentally, those groups do not control the judicial system, and thus did not bring about his conviction.

C. Contrary To The Rationale Of *Ford*, By Permitting The Execution Of Prisoners Who Suffer From Psychotic Delusions, The Fifth Circuit's Approach Permits Executions That Do Not Further The Death Penalty's Retributive Purpose

Insisting that the death penalty must serve its core retributive purpose in every case, Justice Powell wrote in *Ford* that "the Eighth Amendment forbids the execution . . . of those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422. In *Panetti*, the Fifth Circuit held that "'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding.'" *Panetti*, 448 F.3d at 821. Accordingly, the court of appeals allowed the execution of an individual who believes that the State's expressed reason for his execution is merely a pretext for the true reason: to stop him from preaching Gospel. The Fifth Circuit's approach fails to recognize the force of the delusions that characterize psychotic disorders such as Panetti's, and thus, contrary to *Ford*, permits executions where the retributive purpose of the death penalty is not served.

As a simple linguistic matter, "awareness of why" a person is to suffer the death penalty might arguably be construed to include mere "awareness of *what the State has claimed as a reason*." But that circumscription of Justice Powell's test otherwise makes little sense. There are individuals, like Panetti, who know what the State says but believe just as surely that the State's claim is not true. The Fifth Circuit's approach permits the execution of such severely delusional individuals even though they believe they are to be executed for *something other than their crimes*, notwithstanding the State's assertions to the contrary.

The Fifth Circuit's standard makes some forms of severe delusion about one's impending execution matter, while others do not. For example, an individual capable of repeating back the State's stated reasons for the execution may not be executed if he believes that his execution is impossible (as in *Ford*), but may be executed if he considers it possible or

certain but entirely misapprehends why the death penalty is actually being applied to him. Yet both individuals suffer from debilitating delusional thinking about their forthcoming execution and therefore the retributive purpose of the death penalty is not served in either circumstance. Indeed, Justice Powell plainly recognized that the prisoner's awareness of the "why" was as important to the legitimacy of the execution as his awareness of the "whether." Nor does it appear that the retributive purpose is served more fully when the State executes a person whose delusions cause him entirely to disbelieve the State's asserted rationale than when it executes one who cannot comprehend that rationale in the first place.

Indeed, of the various grounds articulated by the *Ford* majority, none supports privileging one sort of fundamental delusion about an impending execution over another. Whether the ground is that "the execution of an insane person simply offends humanity," 477 U.S. at 407, or that such an execution "provides no example to others," *id.*, or that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it," *id.*, or that "madness is its own punishment," *id.*, or that executing an insane person serves no retributive purpose, *id.*; *see also id.* at 422 (Powell, J., concurring), there is no reason to spare one individual beset by a delusion regarding whether death awaits or the State's purported reasons for imposing the penalty, yet to execute another individual plagued by a different yet equally irrational delusion regarding the same subject.

D. All Three *Amici* Have Adopted A Common Position On This Issue

For these reasons, with respect to competency to be executed, *amici* and the American Bar Association have respectively adopted substantively identical versions of a recommendation proposed by the Task Force on Mental Disability and the Death Penalty:

> If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.[14]

This recommendation, *amici* submit, draws the proper line between individuals who are competent to be executed and those who are not. The recommendation recognizes that it is impossible to draw a meaningful line among the myriad delusions that may fog an individual's understanding of his pending execution, or the reasons for it.

Specifically, under the recommendation, awareness of the "why" of an execution necessarily includes understanding the reason the death penalty is being applied in one's own case. The Report of the Task Force, which explains the reasoning that underlies each recommendation, stated that an offender who has been sentenced to die

> must "appreciate" its personal application in the offender's own case—that is, why it is being imposed

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[14] American Psychological Association Council of Representatives, APA Policy Manual: N. Public Interest (2001) (incorporating policy adopted by the Council of Representatives in February 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8 (last visited Feb. 21, 2007); *Mentally Ill Prisoners on Death Row: Position Statement*, American Psychiatric Association (2005), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf (last visited Feb. 21, 2007). The National Alliance on Mental Illness adopted an earlier version of this language. *Public Policy Platform of the National Alliance on Mental Illness* 50 (8th ed. 2006), *available at* http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Public_Policy/NAMI_Policy_Platform/NAMI_public_policy_platform_Nov2006.pdf (last visited Feb. 21, 2007). The ABA adopted a later version of this proposal with a different final clause. *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

> *on the offender*. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30 Mental & Physical Disability L. Rep. 668, 675 (2006). In short, it does not fulfill the retributive purpose of the death penalty to execute an individual, like Panetti, who has no rational understanding as to why the punishment is being imposed on him. For that reason, the Fifth Circuit's ruling should be reversed.[15]

II. Mental Health Professionals Can Reliably Identify The Nature And Extent Of An Individual's Rational Understanding Of An Impending Execution And Routinely Make Similar Assessments In Other Judicial Contexts

The evaluation of an individual's capacity to appreciate—or rationally understand—information is a fundamental and uncontroversial aspect of forensic mental health assessment that can be, and regularly is, performed by mental health professionals. The central feature of such an assessment is the clinical interview.

In the context of competency to be executed, the interview would begin with general, factual questions such as:

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[15] *Amici* and the ABA also resolved that an individual who is found incompetent to face the death penalty should have his sentence permanently commuted to a non-capital punishment. If the death penalty is not commuted but instead is merely suspended in the event the individual's condition were to improve, then the process would force an individual with mental illness to choose between living with psychotic suffering and accepting treatment that might result in his execution. This issue is not implicated here.

"Why are you in prison?" and "Why have you been sentenced to death?" After establishing the factual framework, the interview could be expected to address the examinee's rational understanding with questions like: "Will you be executed?" and "What preparations have you made in anticipation of your execution?" *See, e.g.*, Patricia A. Zapf, *et al.*, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci. & L. 103, 117-119 (2002). To the expert forensic psychologist or psychiatrist, the answers to these questions reveal the subject's mental capacities, and clarifying follow-up questions can probe ambiguous replies. In addition, the clinician will consult collateral sources of information, including prison personnel, family members, and attorneys, as well as the individual's treatment records and mental health history. Kirk Heilbrun, *Principles of Forensic Mental Health Assessment* 99-107 (2001); *see also* Mark A. Small & Randy K. Otto, *Evaluations of Competency to be Executed: Legal Contours and Implications for Assessment*, 18 Crim. Just. & Behav. 146, 154-155 (1991).

In the case at bar, the experts for the State and for the defense largely concurred in the most important aspects of their assessments. *Panetti* v. *Dretke*, 401 F. Supp. 2d 702, 707-708, 712 (W.D. Tex. 2004) (all experts testified that Panetti possesses cognitive functionality with respect to certain topics and communications, yet suffers delusions, including the belief that he will be executed for preaching the Gospel). Disagreements were limited to the degree, and not existence, of Panetti's delusions pertaining to the reason for his impending execution, *Panetti* v. *Dretke*, 448 F.3d 815, 817 (5th Cir. 2006), and thus the parties' dispute has focused on the impact of Panetti's functional deficiencies on the ultimate question of "competence to be executed," which is a legal, not a scientific or medical, question.

Expert agreement in this area can be attributed to two factors: first, the underlying scientific and clinical concepts—the nature of psychotic delusions and the concept of "rational understanding"—are well established; second,

when the diagnosis is made through an evaluation of the prisoner's currently presenting condition, no extrapolation is needed to assess the prisoner's condition at a remote time in the past.[16] Indeed, the expert consensus on Panetti's diagnosis is consistent with studies showing that mental health professionals using structured interviews and assessing present-oriented functional capacities typically have very high levels of agreement. *See, e.g.*, Gary B. Melton, *et al.*, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 138 (2d ed. 1997). Thus, mental health experts can provide testimony that can meaningfully inform judicial decisions about competency to be executed with established procedures that have a record of producing reliable, consistent results.

CONCLUSION

Amici submit that the Fifth Circuit's competence for execution standard permits the execution of individuals who lack any meaningful understanding of the nature and purpose of their punishment, contrary to this Court's decision in *Ford*. *Amici* urge this Court to reverse the judgment of the Fifth Circuit.

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[16] These characteristics should go far to dispel any concerns this Court may have about the role of mental-disease evidence in this context. *Cf. Clark* v. *Arizona*, 126 S. Ct. 2709, 2734-2736 (2006).

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